

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

DANIEL ROSENTHAL, an individual,

Plaintiff,

v.

TIMOTHY POSTER, an individual; and
MARCIA HARTMAN, an individual,

Defendants.

Case No. 2:07-CV-1204-KJD-PAL

ORDER

Currently before the Court is Defendant Timothy Poster's ("Poster") Motion to Dismiss (#19). Plaintiff filed a response in opposition (#21) to which Poster replied (#22).

I. Background

Plaintiff alleges that on December 3, 2004, Plaintiff loaned Defendant Marcia Hartman ("Hartman") \$100,000 in direct reliance on Poster's knowing misrepresentations and omissions concerning Hartman's employment circumstances and ability to repay the loan. (Pl.'s First Amended Compl. 2:1–3.) Plaintiff alleges that Poster knew that his representation of Hartman's employment status and financial situation was false and incomplete. (Pl.'s First Amended Compl. 3:13–22, 4:10–13.) Poster allegedly intended to induce Plaintiff to loan Hartman the money, since Hartman

1 owed \$200,000 to the Golden Nugget, which Poster co-owned at the time. (Pl.'s First Amended
2 Compl. 6:5–7.) Plaintiff asserts that he was damaged in the amount of the money loaned plus
3 interest as a direct result of the reliance on Poster's fraudulent misrepresentations. (Pl.'s First
4 Amended Compl. 6:11–21.)

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6 To induce reliance, Poster allegedly agreed to provide a candid assessment of Hartman,
7 including prospects for repaying the loan. (Pl.'s First Amended Compl. 3:9.) However, Plaintiff
8 asserts that Poster falsely indicated that Hartman's job was secure, and knowingly withheld material
9 facts bearing on Plaintiff's decision to make the loan. (Pl.'s First Amended Compl. 3:23–4:10.)
10 Accordingly, Plaintiff filed his Complaint (#1) on September 5, 2007, alleging fraud against Poster,
11 and subsequently joined Hartman in his First Amended Complaint (#14), alleging a separate cause of
12 action for breach of contract against Hartman.

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14 Poster seeks to dismiss Plaintiff's fraudulent misrepresentation cause of action for failure to
15 state a claim under Rule 12(b)(6) and for lack of subject matter jurisdiction. The Court denies the
16 motion because Plaintiff's factual allegations in support of Count I are sufficient to withstand a
17 motion to dismiss.

18 19 **II. Legal Standard for a Motion to Dismiss**

20 In considering a motion to dismiss for "failure to state a claim upon which relief can be
21 granted" pursuant to Federal Rule of Civil Procedure 12(b)(6), "all allegations of material fact in the
22 complaint are taken as true and construed in the light most favorable to the plaintiff." Williams ex.
23 rel. Tabiu v. Gerber Products Co., 523 F.3d 934, 937 (9th Cir. 2008). Courts look to the face of
24 plaintiff's complaint and not to evidence outside of the pleadings in the assessment. Cervantes v.
25 City of San Diego, 5 F.3d 1273, 1274 (9th Cir. 1993). In ruling on a 12(b)(6) motion, the Court must
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1 examine the complaint to determine whether it contains sufficient factual allegations “to raise a right
 2 to relief above the speculative level.” Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1965 (2007).
 3 However, the Court does not assume the truth of legal conclusions merely because the plaintiff casts
 4 them in the form of factual allegations. Warren v. Fox Family Worldwide, Inc., 328 F.3d 1136, 1139
 5 (9th Cir. 2003). The issue is not whether plaintiffs will ultimately prevail, but whether they have
 6 properly stated a claim. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974).

8 **III. Analysis**

9 **A. Statute of Frauds**

10 Poster argues that in essence Plaintiff’s claim is for the breach of a guarantee and must be
 11 dismissed under the Statute of Frauds. Poster allegedly told Plaintiff that he “would make sure
 12 Hartman could repay it,” and that he “would otherwise make sure everything was ‘okay’ with respect
 13 to the loan.” (Pl.’s First Amended Compl. 4:7–9) The Court agrees that such a statement, without
 14 being reduced to writing, and by itself is not actionable under Statute of Frauds.¹ However, Poster’s
 15 other statements support the claim for fraudulent misrepresentation.
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17 **B. Fraudulent Misrepresentation**

18 To prove fraudulent misrepresentation, a plaintiff must demonstrate:
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- 20 (1) A false representation by the defendant; (2) defendant’s knowledge or belief that
- 21 the representation is false or insufficient basis for making representation; (3)
- 22 defendant’s intention to induce the plaintiff to act or refrain from acting in reliance
- 23 upon the misrepresentation; (4) plaintiff’s justifiable reliance upon the
- 24 misrepresentation; and, (5) damage to the plaintiff resulting from such reliance.

25 Bulbman, Inc. v. Nev. Bell, 825 P.2d 588, 592 (Nev. 1992). Poster asserts that failure to voluntarily
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¹ NRS § 111.220

1 disclose information does not rise to the level of a misrepresentation.

2 Omissions generally do not support misrepresentation claims. See Epperson v. Roloff, 719
3 P.2d 799, 803 (Nev. 1986). However, where a party is bound in good faith to disclose information,
4 the suppression or omission of a material fact is “equivalent to a false representation, since it
5 constitutes an indirect representation that such fact does not exist.” Nelson v. Heer, 163 P.3d 420,
6 426 (Nev. 2007) (false representation element of intentional misrepresentation is indistinguishable
7 with the false representation element of fraudulent misrepresentation); Midwest, 510 P.2d at 878
8 (citation omitted). A party is bound in good faith to disclose and to impart correct information, if a
9 party voluntarily responds to an inquiry. Nev. Nat’l Bank v. Gold Star Meat Co., 514 P.2d 651, 653-
10 54 (Nev. 1973) (“[defendant] was originally under no duty to divulge any information, but once
11 having voluntarily ventured on such a course of action, he was thenceforth required to exercise due
12 care . . . [h]aving assumed this duty [defendant] breached it by failing to state accurately and with full
13 candor”).

14 In the instant matter, Poster had such a duty. Taking the allegations of the amended
15 complaint as true and construing all inferences in Plaintiff’s favor, Poster voluntarily responded to
16 Plaintiff’s inquiry by allegedly agreeing to provide the requested information and by meeting
17 Plaintiff at a restaurant to discuss the inquired matter. Because Poster assumed the duty to be bound
18 in good faith to disclose and impart correct information, the alleged suppression or omission of
19 known facts did rise to the level of a false representation.

20 Poster further argues that Plaintiff failed to allege that Poster intended to omit information or
21 to fraudulently misrepresent anything. The law requires a plaintiff to show, *inter alia*, the
22 “defendant’s *intent to induce plaintiff to act or refrain from acting in reliance upon the*
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1 misrepresentation.” Bulbman, 825 P.2d at 592 (emphasis added). In other words, regardless of a
2 defendant’s intent to misrepresent or omit information, as long as the plaintiff shows that the
3 defendant had intended to induce plaintiff’s reliance, the element is satisfied. See Nelson, 163 P.3d at
4 426.

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6 Here, Poster allegedly intended to induce Plaintiff to make the loan in part because Hartman
7 owed Poster’s co-owned casino, the Golden Nugget, about \$200,000 in gambling debts. Plaintiff
8 further asserts that during their private meeting, Poster had agreed to provide a candid assessment of
9 Hartman, her employment with the casino, her personal situation and other facts impacting her ability
10 to repay the loan. Poster allegedly provided information he knew to be untrue and withheld vital
11 facts. Since Plaintiff pled all the necessary elements of a fraudulent misrepresentation claim, the
12 Court denies the motion to dismiss for failure to state a claim.

13 14 **C. Defendant Poster as an Individual**

15 Poster next claims that Plaintiff’s Complaint is incorrectly directed at Poster as an individual
16 because all of the allegations occurred in Poster’s capacity as owner of the Golden Nugget and
17 employer of Hartman. Poster argues that because he was acting on behalf of the Golden Nugget
18 within the scope of his employment, the Golden Nugget is an indispensable party and liable for his
19 tortious acts.
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21 Generally, a tortious act committed by a corporate officer, regardless of the fact he was acting
22 on behalf of the corporation, is considered as a personal wrongdoing, holding the officer himself
23 personally liable. Semenza v. Caughlin Crafted Homes, 901 P.2d 684, 689 (Nev. 1995); Nev. Rev.
24 Stat. Ann. § 78.138 (West 2007); see also Escude Cruz v. Ortho Pharm. Corp., 619 F.2d 902, 907 (1st
25 Cir. 1980) (“[a]n officer of a corporation is liable for torts in which he personally participated
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1 whether or not he was acting within scope of his authority; what is required is some showing of direct
2 personal involvement...causally related to plaintiff's injury"). Here, Plaintiff allegedly had a personal
3 relationship with Poster, and privately contacted Poster. Therefore, the Court will not dismiss the
4 claims against Poster in his individual capacity.
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6 Poster also argues that diversity jurisdiction does not exist, because the Golden Nugget is an
7 indispensable party. A party is indispensable if a party's interest is so unavoidably involved in the
8 matter that the court cannot proceed without their joinder. Fed. R. Civ. P. 19. Even if Poster joins
9 the Golden Nugget as a third-party defendant, which he has not yet requested, diversity is not
10 destroyed. Diversity jurisdiction requires complete diversity, meaning that each plaintiff is diverse
11 from each defendant. See 28 U.S.C. § 1332(a)(1) (2005); Wis. Dep't of Corr. v. Schacht, 524 U.S.
12 381, 388 (1998). Generally, the complete diversity requirement is to be satisfied at the
13 commencement of the action, and once the jurisdiction is established, it is not defeated by later
14 changes or development in the suit unless the subsequently joined party is *both* non-diverse and
15 indispensable. Lincoln Prop. Co. v. Roche, 546 U.S. 81, 82 (2005) (emphasis added). Because
16 Poster has failed to meet his burden in establishing lack of diversity jurisdiction, the Court denies the
17 motion to dismiss on this basis.
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1 **IV. Conclusion**

2 Accordingly, IT IS HEREBY ORDERED that Defendant Timothy Poster's Motion to
3 Dismiss (#19) is **DENIED**.
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5 DATED this 29th day of September 2008.
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10 Kent J. Dawson
11 United States District Judge
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